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SUBJECT: LEGAL ADVISER BELLINGER'S VISIT TO GERMANY TO  
DISCUSS LEGAL ASPECTS OF THE WAR ON TERROR

Classified By: MINISTER-COUNSELOR FOR ECONOMIC AFFAIRS ROBERT F. CEKUTA  
FOR REASONS 1.4 (b) AND (d)

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Summary  
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¶1. (C) Legal Adviser Bellinger used the opportunity of a U.S.-German conference on international legal issues relating to the Global War on Terror to address widespread German/European misperceptions about U.S. policies and practices. Bellinger and other senior USG participants underscored the U.S. commitment to comply with our laws and international obligations in the conduct of counterterrorism operations and treatment of detainees. Bellinger pointed out that the U.S. is in a state of armed conflict with Al Qaeda, even though Al Qaeda is a non-state actor. The use of military force against Al Qaeda worldwide as well as the detention of Al Qaeda fighters seized on foreign battlefields is therefore justified. U.S. participants also elaborated on the provisions of the Military Commissions Act of 2006, noting that the military commissions established by the act contain safeguards to ensure fairness and due process. In a side-bar meeting, a leading member of the German parliamentary committee investigating issues relating to U.S.-German counterterrorism cooperation agreed with the Legal Adviser that Germany and the U.S. cannot afford to disagree on the responses to terrorism. The German parliamentarian nonetheless cited "unresolved cases from the past" (Kurnaz and El Masri) as impediments to cooperation. Bellinger also spoke at the American Academy in Berlin on the legal framework for the war on terror.

¶2. (SBU) German conference participants accepted the USG position that a state of armed conflict had existed between the U.S. and Al Qaeda in the immediate aftermath of the 9/11 terrorist attacks. Most German participants, however, did not agree that a state of armed conflict still exists. German participants also expressed a clear preference for treating all terrorist detainees according to traditional criminal law procedures. End Summary.

¶3. (U) On October 12-13, 2006 a senior USG interagency delegation led by State Department Legal Adviser John Bellinger participated in a colloquium in Berlin entitled "Legal Issues in the Fight against Terrorism." The conference, which was jointly hosted by the German MFA and the Max Planck Institute for Comparative and International Law, focused on the legal framework for international cooperation in counterterrorism efforts and the interpretations of the application of international legal

principles and the Geneva Conventions to terrorist fighters. Bellinger was joined by a senior interagency team, including DNI General Counsel Benjamin Powell, DoD Principal Deputy General Counsel Daniel Dell'Orto, DOJ Assistant Attorney General Kenneth Wainstein, DOJ Deputy Assistant Attorney General Bruce Swartz, EUR PDAS Kurt Volker and S/P Deputy Director Matthew Waxman. German participants included Foreign Minister Frank-Walter Steinmeier, MFA Legal Adviser Georg Witschel, and Interior Ministry State Secretary August Hanning. A number of U.S. and German academics and other government officials also participated. Bellinger also met separately with Thomas Oppermann, the Social Democratic spokesman on the German Parliamentary Investigative Committee currently examining issues related to U.S.-German cooperation on counterterrorism (see para 16).

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Misperceptions about U.S. Counterterrorism Policies  
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¶4. (SBU) The Legal Adviser welcomed the opportunity to engage in a dialogue on the international legal aspects of the global war on terror, noting that there are misconceptions about the USG's policies and their compliance with international legal norms. These misunderstandings have led to mutual suspicions that undermine our common efforts to combat international terrorism. Bellinger cited the upcoming assumption by Germany of the EU and G-8 presidencies as an opportunity for the German Government to demonstrate leadership on counterterrorism issues.

¶5. (SBU) Mr. Bellinger outlined the USG's views of the

BERLIN 00003098 002 OF 004

international legal framework for our counterterrorism policies, in particular the detention of unlawful enemy combatants. He began by noting that the pre-9/11 international legal framework was not well-adapted to deal with external terrorist threats, such as that posed by Al Qaeda internationally. Likewise, the U.S. view is that the Geneva Conventions (with the exception of the minimum standards set forth in Common Article Three) do not apply to our conflict with Al Qaeda.

¶6. (SBU) Bellinger also noted the USG view that it is in a legal state of armed conflict with Al Qaeda, even though Al Qaeda is a non-state actor. In the U.S. view, this justifies the use of military force against Al Qaeda where necessary, and the detention of Al Qaeda fighters seized on foreign battlefields, such as in Afghanistan.

¶7. (SBU) Deputy Assistant Attorney General Swartz pointed to the noteworthy developments in international legal mechanisms to combat terrorism, including the progress made toward concluding mutual legal assistance agreements between the U.S. and Germany, as well as with the EU multilaterally. At the same time he lamented misunderstandings about U.S. policies and procedures -- such as the extent to which U.S. law contains effective data-privacy provisions -- that hamper our effective cooperation.

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Detainee Procedures and Treatment  
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¶8. (SBU) One of the misperceptions Bellinger and the other USG participants sought to rectify was the widespread European view that Guantanamo detainees are not afforded basic legal rights. The Legal Adviser emphasized that our treatment of detainees is fully consistent with applicable U.S. law as well as with our international obligations. He outlined the mechanisms that allow detainees to appeal their continued detention, including Combatant Status Review Tribunals -- whose decisions are reviewable by U.S. courts --

and Administrative Review Boards.

¶9. (SBU) Bellinger, Dell'Orto, and Powell also elaborated on the provisions of the Military Commissions Act of 2006 (the "MCA"), noting that the military commissions enabled by the legislation contain numerous safeguards to ensure fairness and due process. Secret evidence, for example, will not be allowed -- defendants will have access to all evidence presented against them. Moreover, the Act mandates an absolute ban on evidence obtained through unlawful coercive means. Moreover, the MCA ensures the independence of judges and provides for an ample appellate review process.

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Unlawful Enemy Combatants  
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¶10. (SBU) The majority of the German participants took issue with the concept of "unlawful enemy combatant." Some, such as Judge Wolfgang Schomburg of the International Criminal Tribunal for the Former Yugoslavia, argued that international law recognizes only two possible classes of detainees: prisoners of war and those prosecuted through traditional criminal justice mechanisms. The prevailing view among the German participants was that terrorist fighters seized on a foreign battlefield in the context of an international armed conflict must either be treated as prisoners of war or as civilians, to Fourth Geneva Convention protections apply.

¶11. (SBU) Legal Adviser Bellinger reminded the conference participants that the USG did not create the concept of "unlawful enemy combatants." The suggestion that the USG was "making up the rules as it went along" is simply not accurate.

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State of War against Al Qaeda  
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¶12. (SBU) Many German participants also questioned whether it is appropriate to maintain that a state of armed conflict continues to exist between the U.S. and Al Qaeda. While most conceded that the initial military response to the 9/11 attacks -- including military operations in Afghanistan -- had been justified, there was less agreement about whether a

BERLIN 00003098 003 OF 004

state of armed conflict exists today. Professor Ruediger Wolfrum of the Max Planck Institute posited that, according to customary international legal principles, detention of prisoners must end when hostilities end. The question, he added, is when -- in the case of the global war on terror -- hostilities have ended. MFA Legal Adviser Witschel also argued that the state of armed conflict cannot remain open-ended.

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German Preference for Criminal Prosecution of Terrorists  
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¶13. (SBU) In light of the prevailing view among German participants that a state of armed conflict no longer exists, most German speakers argued that terrorist detainees should be prosecuted using traditional criminal law principles and procedures. There was nonetheless agreement among the German participants that the adoption of the MCA, with its extensive procedural safeguards, is a considerable improvement compared to the pre-existing legal situation.

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American Academy in Berlin  
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¶14. Before the bilateral conference, Bellinger delivered a speech in a forum sponsored by the American Academy in Berlin. Since its opening in 1998, the American Academy has provided a forum for numerous high-level symposia on a broad

range of transatlantic issues. Bellinger spoke about issues related to the legal framework for the war on terror, and took a number of questions related to the new Military Commissions Act. A number of international journalists attended.

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Holocaust Foundation Case  
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¶15. In a separate conversation with Bellinger, Steinmeier and Witschel asked the United States to consider supporting an appeal by the Germans to the Supreme Court in the German Holocaust Foundation case. Steinmeier indicated that he intended to call the Secretary on this issue. Bellinger informed Steinmeier that it appeared unlikely that the Supreme Court would grant certiorari in cases like this, but that the United States would look at whether there are ways to be helpful.

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Meeting with Bundestag Member Thomas Oppermann  
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¶16. (C) Social Democrat (SPD) Bundestag Member Thomas Oppermann told the Legal Adviser there are two goals: keeping terrorists at bay but also obtaining information from them. In the future, Germany and the U.S. cannot afford to disagree on the responses to terrorism, but meanwhile there remain unresolved cases from the past. Oppermann, who sits on the Bundestag's BND (Intelligence Service) Investigation Committee, referred to the cases of Khaled Al Masri, who claims he was taken by U.S. officials from Macedonia to Afghanistan, and Murmat Kurnaz, recently released from Guantanamo. Oppermann said the Investigation Committee does not know what to do but that opposition political parties and the press will put pressure on the CDU/CSU-SPD government coalition to reach some resolution. Oppermann said Al Masri was in the wrong place at the wrong time and both Kurnaz and Al Masri are "innocent in a way" and were "captured by mistake" although both probably sympathize with extremists. Oppermann told Bellinger that former Ambassador Coats had told former Interior Minister Schily that "it was a mistake to take Al Masri." Oppermann said Ambassador Coats had told Schily that Al Masri had received money upon his release; but Al Masri had claimed he had only received back money that had been confiscated. Oppermann said it would be helpful if the USG could confirm that Al Masri had been paid; this could support a German government resolution that compensation had taken place. Oppermann suggested that Germany might send the USG a diplomatic note on the matter. Oppermann's staff member Christian Heyer said Germany might in the future seek assurances before granting flight clearances that US aircraft are not engaged in rendition or contain any detainees.

BERLIN 00003098 004 OF 004

¶17. (U) This message was cleared by Legal Adviser Bellinger subsequent to his departure from Berlin.  
TIMKEN JR